

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

Pending before the Court is the Motion to Dismiss, (ECF No. 35), filed by Defendant National Staff Organization–Nevada (“NSO–Nevada”). Plaintiff Jaime Reborn (“Plaintiff”)¹ filed a Response, (ECF No. 40),² and NSO–Nevada filed a Reply, (ECF No. 41).

Also before the Court is the Motion to Dismiss, (ECF No. 36), filed by Defendant Nevada State Education Association (“NSEA”). Plaintiff filed a Response, (ECF No. 39), and NSEA filed a Reply, (ECF No. 42). For the reasons discussed below, the Court **GRANTS** both NSEA and NSO–Nevada’s (collectively “Defendants”) Motions to Dismiss.³

¹ In light of Plaintiff's status as a pro se litigant, the Court has liberally construed his filings, holding them to standards less stringent than formal pleadings drafted by attorneys. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

² Plaintiff actually filed two Responses to NSO—Nevada’s Motion to Dismiss, the first on September 8, 2016, and the second on September 9, 2016. (ECF Nos. 38, 40). A review of both documents reveals the first Response is identical to the second except that the second page of the ECF No. 38 is clearly missing. The Court therefore construes the ECF No. 40 as the operative Response.

³ Also pending before the Court is NSO—Nevada’s Motion asking “the Court to Order Plaintiff Jamie Reborn to amend his Amended Complaint (Doc. 32) to number each paragraph and limit the allegations included in each paragraph to a single set of circumstances, as required by FRCP 10(b).” (Mot. 1:19–26). Because Plaintiff ultimately filed a Second Amended Complaint, (ECF No. 34), with numbered paragraphs, the Court DENIES NSO-Nevada’s Motion as moot.

1 **I. BACKGROUND**

2 This case centers upon allegations that Defendants breached the collective bargaining
 3 agreement governing the terms of Plaintiff's employment. (*See* Compl. 10:12–3, ECF No. 1;
 4 NSEA MTD, 2:16–18, ECF No. 5). Plaintiff alleges that until December 31, 2012, he was an
 5 employee of NSEA and a member of NSO–Nevada, the “union that represent[s] NSEA non-
 6 management staff members.” (Compl. 1:26–2:5). Plaintiff alleges that on August 13, 2012, he
 7 applied for a Director of Communications position with NSEA.⁴ (*Id.* 2:8–10). According to
 8 Plaintiff, NSEA “unbelievably” responded “that [his] qualifications did not merit and [sic]
 9 interview for Director of Communications.” (*Id.* 2:14–15). Plaintiff alleges “that [he] knew,
 10 without question, that [he] was qualified for the position.” (*Id.* 2:15–17).

11 Based on NSEA’s failure to interview Plaintiff for the Director of Communications
 12 position, Plaintiff alleges that on September 13, 2012, he “officially asked [NSO–Nevada], via
 13 email, to file a grievance on [his] behalf.” (*Id.* 3:16–19). Subsequently, on December 31, 2012,
 14 NSEA allegedly eliminated Plaintiff’s position and terminated his employment. (*Id.* 7:6–9).
 15 Plaintiff alleges he “continued to pay union dues to NSO–Nevada until [his] last day as an
 16 official employee of NSEA.” (*Id.* 7:22–23). Plaintiff further alleges that “NSO–Nevada took
 17 no actions to fight for [his] job . . . nor did the NSO–Nevada take any actions [sic] to fight for
 18 [his] request to interview for the Director of Communications [position].” (*Id.* 7:19–21).

19 Based on these allegations, Plaintiff filed his Complaint against both Defendants,
 20 asserting claims for: (1) breach of contract; (2) breach of the covenant of good faith and fair
 21 dealing; and (3) breach of fiduciary duty. (*Id.* 22:4–28:22). Each Defendant subsequently filed
 22 Motions to Dismiss, arguing that Plaintiff’s claims are (1) preempted by § 301 of the Labor
 23

24 ⁴ Although Plaintiff’s Complaint states that he submitted his application in “2015,” the Court surmises from the
 25 context of this statement that “2015” was a typo. (*See* Compl. 2:10) (alleging that the application deadline was
 “August 15th, 2012”).

1 Management Relations Act (“LMRA”), 1947, 29 U.S.C. § 185, (2) subject to the statute of
 2 limitations therein, and (3) therefore untimely. (*See* Mots. to Dismiss, ECF Nos. 5, 9).

3 The Court agreed that Plaintiff’s claims “are clearly preempted [by the LMRA] and
 4 subject to the six-month statute of limitations.” (Order 5:23, ECF No. 30). Because “Plaintiff’s
 5 claims accrued no later than December 31, 2012” and “Plaintiff . . . did not file his Complaint
 6 until October 21, 2015,” the Court determined that Plaintiff’s claims are time-barred. (*Id.* 6:1–
 7 5). Further, the Court rejected Plaintiff’s argument that the statute of limitations should be
 8 tolled because the Defendants engaged in “fraudulent concealment” when they “concealed”
 9 from Plaintiff that the individual to whom NSEA offered the Director of Communications
 10 position, Nick DiArchangel (“DiArchangel”), did not have a master’s degree at the time of his
 11 hire. (Resp. to NSO–Nevada MTD 2:20–21, ECF No. 15; Resp. to NSEA MTD 1:22–23, ECF
 12 No. 14). The Court explained:

13 [T]here is no plausible basis for such tolling in the instant case.
 14 Plaintiff’s allegation of fraudulent concealment has no bearing on
 15 NSO–Nevada’s failure to initiate a grievance or NSEA’s failures to
 16 “fully vet[Plaintiff’s] application” or “allow[Plaintiff] to interview
 17 for the Director of Communications position.” (Compl. 22:23–25).
 Accordingly, even assuming Defendants concealed DiArchangel’s
 job qualifications, Plaintiff has not demonstrated any reason to toll
 the six-month statute of limitations.

18 (Order 6:14–7:3).

19 The Court therefore dismissed Plaintiff’s claims as time-barred, but granted Plaintiff
 20 leave to amend “to allege facts demonstrating that tolling is appropriate.” (*Id.* 7:14–20). In the
 21 instant Motions to Dismiss, Defendants argue Plaintiff’s Second Amended Complaint (“SAC”),
 22 (ECF No. 34), again fails to allege any viable exceptions to the LMRA’s statute of limitations.

23 **II. LEGAL STANDARD**

24 Rule 12(b)(6) of the Federal Rules of Civil Procedure mandates that a court dismiss a
 25 cause of action that fails to state a claim upon which relief can be granted. *See North Star Int’l*

1 *v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to
2 dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the
3 complaint does not give the defendant fair notice of a legally cognizable claim and the grounds
4 on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering
5 whether the complaint is sufficient to state a claim, the Court will take all material allegations
6 as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v.*
7 *Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

8 The Court, however, is not required to accept as true allegations that are merely
9 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
10 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
11 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a
12 violation is *plausible*, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
13 *Twombly*, 550 U.S. at 555) (emphasis added). In order to survive a motion to dismiss, a
14 complaint must allege “sufficient factual matter, accepted as true, to state a claim to relief that
15 is plausible on its face.” *Id.* “A claim has facial plausibility when the plaintiff pleads factual
16 content that allows the court to draw the reasonable inference that the defendant is liable for the
17 misconduct alleged.” *Id.*

18 “Generally, a district court may not consider any material beyond the pleadings in ruling
19 on a Rule 12(b)(6) motion However, material which is properly submitted as part of the
20 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard*
21 *Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly,
22 “documents whose contents are alleged in a complaint and whose authenticity no party
23 questions, but which are not physically attached to the pleading, may be considered in ruling on
24 a Rule 12(b)(6) motion to dismiss” without converting the motion to dismiss into a motion for
25 summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule

1 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
2 *Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers
3 materials outside of the pleadings, the motion to dismiss is converted into a motion for
4 summary judgment. *See* Fed. R. Civ. P. 12(d); *Arpin v. Santa Clara Valley Transp. Agency*, 261
5 F.3d 912, 925 (9th Cir. 2001).

6 If the court grants a motion to dismiss, it must then decide whether to grant leave to
7 amend. Pursuant to Rule 15(a), the court should “freely” give leave to amend “when justice so
8 requires,” and in the absence of a reason such as “undue delay, bad faith or dilatory motive on
9 the part of the movant, repeated failure to cure deficiencies by amendments previously allowed,
10 undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the
11 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is
12 only denied when it is clear that the deficiencies of the complaint cannot be cured by
13 amendment. *See DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

14 **III. DISCUSSION**

15 The Court’s Order dismissing Plaintiff’s Complaint explained that any facts related to
16 DiArchangel could not form a basis for equitable tolling. (Order 6:7–7:3, ECF No. 30). Indeed,
17 as the Court stated, such facts are entirely irrelevant to Plaintiff’s claims regarding NSEA’s
18 failure to “allow[] [him] to interview for the job of NSEA DOC and not vetting [his]
19 qualifications for the job,” and NSO–Nevada’s failure to file a grievance on Plaintiff’s behalf.
20 (*See* SAC ¶¶ 59–93, ECF No. 34). After reviewing the SAC, the Court finds Plaintiff’s
21 allegations regarding equitable tolling merely regurgitate the claims concerning DiArchangel
22 already rejected by the Court. Accordingly, the Court GRANTS Defendants’ Motions and
23 dismisses Plaintiff’s SAC as time-barred. Because Plaintiff has already received a second
24 chance to reform his Complaint in this regard, the Court concludes that granting leave to amend
25 would be futile and dismisses Plaintiff’s SAC with prejudice. *See Foman*, 371 U.S. at 182

1 (noting “futility of amendment” and “repeated failure to cure deficiencies by amendments
2 previously allowed” are grounds on which leave to amend may be denied).

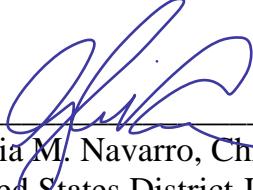
3 **IV. CONCLUSION**

4 **IT IS HEREBY ORDERED** that Defendants’ Motions to Dismiss, (ECF Nos. 35, 36),
5 are **GRANTED**. Plaintiff’s Second Amended Complaint is **DISMISSED with prejudice**.

6 **IT IS FURTHER ORDERED** that NSO—Nevada’s Motion for a More Definite
7 Statement, (ECF No. 33), is **DENIED as moot**.

8 The Clerk of Court is instructed to close this case.

9 **DATED** this 10 day of February, 2017.

10
11 
12 Gloria M. Navarro, Chief Judge
13 United States District Judge